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No. 00-1876

IN THE

Supreme Court of the United States

THE CITIZENS BANK OF WESTON, INC.,
Petitioner,

v.

THE CITY OF WESTON,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

REPLY BRIEF FOR PETITIONER

W.T. WEBER, JR.
WEBER & WEBER
239 Main Avenue
Post Office Box 270
Weston, WV 26452
(304) 269-2228

* Counsel of Record

JOHN G. ROBERTS, JR.*
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810

Counsel for Petitioner

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1. The City begins its Opposition with an argument raised for the first time in this litigation—that the Equal Protection Clause does not apply because "there is no governmental action." Opp. 3. Of course there is. The City imposes the B&O tax and does so in a manner that is alleged to deprive Citizens Bank of equal protection. The fact that Citizens could avoid the City's tax by "open[ing] an office directly outside the Weston city limits," *id.*, is hardly responsive to the contention that the City is violating the Bank's constitutional rights. "If you don't like it, move" is always an available rejoinder to illegal government action, but has never before been considered an adequate legal defense.

2. The City next seeks to avoid consideration of the merits of the Bank's challenge by arguing that it is not ripe. The West Virginia Supreme Court of Appeals considered the record and status of the controversy between Citizens and the City sufficient to proceed to decide Citizens' constitutional claim. That claim is based on the fact that the City purports to levy a tax on engaging in the business and occupation of banking in Weston, but treats different banks engaged in the same activity—accepting deposits in Weston, issuing mortgages in Weston, and so on—differently depending on the happenstance of whether they report that Weston banking activity in Weston or elsewhere. The City of course asserts that its tax is constitutional, but does not suggest that the factual predicate for Citizens' claim is in any way unfounded. The nature of that claim will not be affected in any way by the further factual development contemplated by the City. That is why the West Virginia Supreme Court of Appeals proceeded to decide the question presented, and why this Court should do so as well.

3. The City purports to defend the proposition that the West Virginia Supreme Court's dispositive reliance on *Washington* v. *Davis*, 426 U.S. 229 (1979), "was appropriate," Opp. 6, but actually does something quite different. The City contends that in relying on *Davis*, the court below "was saluting the principle that local government must have leeway in establishing local taxes." *Id.* at 7. There is indeed such a principle, but *Davis* has nothing to do with it, and it is fully vindicated by proper application of the precedent *both* sides below and the Circuit Court agreed governed this case—not *Davis* but *Allegheny Pittsburgh Coal Co.* v. *County Comm'n of Webster County, W. Va.*, 488 U.S. 336 (1989). The City finds it "curious that the bank makes much of *Davis*," Opp. 8, but it was the West Virginia Supreme Court that did so, Pet. App. 11a-14a, even though neither

party so much as cited the case and it has nothing to do with local taxation.

The City's defense of the lower court's interpretation of the precedent that both sides had agreed was pertinent—*Allegheny Pittsburgh*—reduces again to nothing more than the cavalier assertion that Citizens can "ship out of the city" or "decline" to conduct banking business altogether. Opp. 9. Again, such retorts have not heretofore been recognized as valid defenses to claims of an equal protection violation.

4. *Long Island Lighting Co.* v. *Town of Brookhaven, N.Y.*, 889 F.2d 428 (2d Cir. 1989), is directly conflicting authority, and the City's response does nothing to mitigate the conflict. The City contends that *Long Island Lighting* "did *not* do away with the necessity of showing unlawful discriminatory intent." Opp. 10 (emphasis in original). This is what the Second Circuit held: "While proof of an intent to discriminate has been required in *other* types of situations," 889 F.2d at 432 (citing, *inter alia*, *Davis*) (emphasis added), "in the context of real property tax assessments, evidence of the assessor's mental processes need not be proved." *Id.* *Davis*, on which the court below relied, was thus clearly held to be inapplicable. If any doubt remained, the Second Circuit went on to explain that "proof that the assessment method results in *disparate treatment* of similarly situated taxpayers is all that is required * * * to succeed in a * * * equal protection claim." *Id.* (emphasis added). Indeed, even the language from *Long Island Lighting* quoted by the City makes clear that what is required is " 'proof of * * * *inequitable impact*,' " Opp. 10 (quoting 889 F.2d at 432) (emphasis added)—precisely the point rejected by the court below.

5. The City ends with an analogy to two taxpayers who pay different amounts of income tax because they have different incomes. Opp. 11. The analogy is, of course,

misplaced. Citizens Bank and the branch banks in Weston do not pay different B&O taxes because they engage in different amounts of banking business in Weston. The problem arises from the fact that although the branch banks engage in banking activities in Weston that are otherwise subject to the tax, they avoid it by reporting the activities elsewhere. Of two banks engaging in the same banking activity in Weston, one is taxed and the other is not. That disparate treatment should have been evaluated under *Allegheny Pittsburgh*. It was not, solely because the West Virginia Supreme Court—contrary to the Second Circuit in *Long Island Lighting*—thought *Davis* applied in such a case. This Court should grant certiorari to resolve this conflict on such a basic question of constitutional law.

CONCLUSION

For the foregoing reasons, and those set forth in the petition, the petition should be granted.

Respectfully submitted,

W.T. WEBER, JR.
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